



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: AUGUST 24, 2022

IN THE MATTER OF:

Appeal Board No. 623643

PRESENT: JUNE F. O'NEILL, MEMBER

The Department of Labor issued the initial determination holding the claimant ineligible to receive benefits, effective November 8, 2021, until the reason for your ineligibility no longer exists, on the basis that the claimant was not capable of work. The claimant requested a hearing. The Commissioner of Labor objected that the hearing request was not made within the time allowed by statute.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There was an appearance by the claimant and on behalf of the Commissioner of Labor. By decision filed May 3, 2022 (A.L.J. Case No.), the Administrative Law Judge sustained the Commissioner of Labor's timeliness objection and continued in effect the determination.

The claimant appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The notice of determination has a mail date of December 3, 2021. The claimant received the determination on December 5, 2021. The claimant read the determination and the instructions. The instruction on the determination advises that "if you disagree with this determination, you have the right to request a hearing... no later than 30 days from the mail date on this notice".

The claimant first called the claim center several times on January 11, 2022,

to report that she was now able to return to work. A Department of Labor representative told her that all she needed to do was to send in her DB-450 for reconsideration of her capability. The claimant sent in the DB-40 form on January 11, 2022. After that date, the claimant contacted the call center and spoke to different representatives about her claim. On February 18, 2022, a representative told the claimant to request a hearing. The claimant requested a hearing on February 18, 2022.

OPINION: Pursuant to Labor Law § 620 (1), a party who is dissatisfied with a determination may request a hearing but must do so within thirty days of the mailing or personal delivery of the determination. Pursuant to the Board's regulations, a hearing request is deemed timely if postmarked within thirty days of the receipt of such determination. Absent proof to the contrary, a determination is deemed mailed on the date recited on the determination and received by the party to whom it was addressed no later than five business days after the date mailed (12 NYCRR § 461 [1]).

The credible evidence establishes that the claimant received the December 3, 2021, determination on December 5, 2021. She also admits that she read the instruction on the determination that she must request a hearing no more than 30 days from the determination dated December 3, 2021. The claimant requested a hearing on February 18, 2022, which more than 30 days of the December 3, 2021, mail date. We therefore conclude that the claimant's request for a hearing was untimely.

However, as the lack of capability determination is an eligibility determination and therefore continues until the reason for the ineligibility no longer exists, the claimant's request for a hearing is timely beginning January 19, 2022, a date that is read back to thirty days from the post-marked date of the hearing request February 18, 2022. The claimant is therefore entitled to a decision on the merits from the January 19, 2022, to the hearing date on May 2, 2022.

The credible evidence establishes that the claimant submitted a form DB-40 for eligibility reconsideration on January 11, 2022, as she was capable of work. Under these facts we conclude that the claimant was eligible for benefits, beginning January 19, 2022, and until May 2, 2022, the date of the hearing.

DECISION: The decision of the Administrative Law Judge, is modified

accordingly, and as so modified, is affirmed.

The Commissioner of Labor's timeliness objection as modified to be effective beginning November 8, 2021, and ending January 18, 2022, is sustained.

The Commissioner of Labor's timeliness objection as modified to be effective beginning January 19, 2022, until May 2, 2022, is overruled.

The initial determination holding the claimant ineligible to receive benefits on the basis that the claimant was not capable of work, as modified to be effective beginning November 8, 2021, until January 18, 2022, is continued in effect.

The initial determination holding the claimant ineligible to receive benefits on the basis that the claimant was not capable of work, as modified to be effective January 19, 2022, until May 2, 2022, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

JUNE F. O'NEILL, MEMBER